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No. 93-465

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1993

JAMES A. SCARFONE,

Petitioner,

v.

STATE BOARD OF LAW EXAMINERS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE MICHIGAN SUPREME COURT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

I

Where Petitioner's case was filed below as an original proceeding in the Michigan Supreme Court, the record stands contested or undeveloped in certain relevant respects, and the Court denied the requested mandamus relief without opinion leaving the basis for decision subject to conjecture, should this Court grant certiorari?

II

Where the federal Office of the United States Trade Representative unequivocally advised the State of Michigan that nothing in the United States-Canada Free Trade Agreement requires a state to waive its residency requirements for admission to its bar for Canadian lawyers granted a United States temporary visa pursuant to that agreement's terms, did Petitioner, a nonresident of any state or territory of the United States or the District of Columbia, demonstrate in his original mandamus action a clear constitutional right to be admitted to the Michigan bar?

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STATEMENT OF THE CASE

Petitioner below challenged Michigan's statutory bar admission requirements in an original proceeding filed in the Michigan Supreme Court pursuant to Michigan Court Rule 7.304. His complaint for mandamus sought superintending control over the Michigan Board of Law Examiners (hereinafter the Board).

Under Michigan law, an applicant for admission to the bar bears the burden of proving that he or she has met each of the qualifications for admission to the bar, which qualifications are specified both by court rule and by statute. Mich. Comp. Laws Ann. 600.934(1). Mandamus relief under Michigan law is not available unless the plaintiff shows that he or she has a clear legal right to the relief requested and that the defendant

has a clear legal duty to grant the request. Shelby Township Police and Fire Retirement Board v Charter Township of Shelby, 438 Mich 247, 263; 475 NW2d 249 (1991). Moreover, the Board's exercise of discretion is not disturbed absent a clear showing that an abuse has occurred. Mitchell v Board of Law Examiners, 155 Mich 452, 454-455; 119 NW 587 (1909).

The residency requirement at issue in this case, which Petitioner concedes he does not meet, does not require residency in Michigan; rather, section 934 of Michigan's Revised Judicature Act, Mich. Comp. Laws Ann. 600.934(1) (hereinafter section 934 of the RJA), requires an applicant to show only that he or she "is a resident of 1 of the states or territories or the District of Columbia."

The record below consists largely of correspondence between Petitioner and the Board, which Petitioner has shared with this Court, and correspondence between the Board's counsel and the Office of the United States Trade Representative, which Petitioner has understandably failed to mention anywhere in his Petition. In this correspondence (Appendix A), the United States Trade Representative advised that "nothing in that Chapter [Chapter 15 of the United States-Canada Free Trade Agreement] requires a state to waive its residency requirements for admission to its bar for Canadian lawyers granted a U.S. temporary entry visa pursuant to that Chapter." (Defendant's Supplemental Brief Opposing Mandamus/ Superintending Control: Exhibit A, p. 1.)

While the record stands uncontested that Petitioner is a nonresident of any state or territory of the United States or the District of Columbia and holds a valid Trade Canada visa, the record is contested with regard to whether Petitioner has a business office in Detroit, Michigan and as to whether he pays Michigan property taxes through the payment of rent to a landlord. (Defendant's Answer to First Amended Complaint, ¶¶ 8, 10, 11.) In an attempt to demonstrate to the Michigan Supreme Court that Petitioner's case was not unique and carried an impact beyond Petitioner personally, he alleged without support that "at least three other native Canadians [had] obtained their Michigan law license despite being domiciled in Canada ... ." (First Amended Complaint,

¶ 69.) A review of the alphabetical roster of all licensed members of the Michigan State Bar revealed, however, that two of the three were not, in fact, so listed, and the third listed only a business address and not a residential address. (Answer to First Amended Complaint, ¶ 69.)

Finally, Petitioner is correct when he states that the Michigan Supreme Court decided his complaint without opinion and "without benefit of oral argument." Pet. 7. He fails to advise, however, that it was Petitioner himself who waived oral argument. (Plaintiff's Brief in Support of First Amended Complaint, Cover Page.) He is also plainly wrong when he asserts that his request was denied "without reply or supplemental briefing by the

parties." Pet. 7. In fact, the Board filed a 43-page brief opposing mandamus, with attachments, a supplemental brief opposing mandamus, and answers to both Petitioner's complaint and first amended complaint.

SUMMARY OF REASONS FOR DENYING THE WRIT

This Court should deny the Petition for several reasons. First, the case was initiated in an original proceeding for mandamus, is presented on an inadequate factual record, and generated a decision of the Michigan Supreme Court without opinion leaving the parties and this Court to speculate as to the basis for the decision below. Second, the procedural posture of the case limits the impact of the court's decision below to Petitioner alone and serves to underscore the absence of any important and vital federal issue or conflict of decisions created by this case. Third, the writ should be denied because of its unique facts, including the fact that the opinion of the federal Office of the United

States Trade Representative was provided in response to a request made in this case, which confirmed that no provision of the United States-Canada Free Trade Agreement displaces the state bar admission residency requirement at issue here. Finally, this Court should deny the writ because the court below correctly denied the mandamus relief requested, the Petitioner having failed to establish a clear legal right to be admitted to the bar of Michigan under either the Federal Constitution's Supremacy, Equal Protection, and Commerce Clauses or 42 USC § 1981.

REASONS FOR DENYING THE WRIT

I

THE ORDER OF THE MICHIGAN SUPREME COURT DENYING PETITIONER'S REQUEST FOR MANDAMUS RELIEF WITHOUT OPINION PRESENTS NO CONFLICT WITH ANY DECISIONS OF OTHER STATE OR FEDERAL APPELLATE COURTS OR WITH THIS COURT'S DECISIONS AND IS, ACCORDINGLY, UNWORTHY OF REVIEW.

Among the options available to the Michigan Supreme Court in considering an original complaint for mandamus seeking superintending control over the Michigan State Board of Law Examiners are to set the case for argument as on leave granted, to grant or deny the relief requested, or to enter another order it finds appropriate. Mich. Crt. Rule 7.304(D) (Appendix B). Although he carried the burden of proving entitlement to mandamus relief below, Petitioner waived oral argument in this case. In denying

the relief requested, the court below stated only that it was "not persuaded that it should grant the requested relief." Pet. App. 1a. Thus, no authoritative view of the Michigan Supreme Court addressing the constitutional arguments raised by Petitioner is presented in this case. Nor is there any precedent of Michigan's highest court which can be said to conflict with any appellate decisions, state or federal. At best, the parties can only speculate as to the shortcomings the court below found in Petitioner's case prompting its decision, including the possibility that Petitioner failed to carry his burden of proof under Michigan's law of mandamus. Such speculation does not serve as an adequate basis for this Court's consideration.

Even Petitioner concedes that the best "conflict" he can attempt to show is one "by analogy" only. Pet. 8. He points to cases in which state residency requirements were at issue and where citizenship requirements were imposed by the state. This case presents neither factual situation, however, and Petitioner's analogy fails as too remote.

Section 934 of the RJA at issue here requires residency in any state or territory or the District of Columbia, and not residency in Michigan exclusively, raising entirely different considerations than cases involving state residency requirements (where the Privileges and Immunities Clause is commonly at issue) and prompting an entirely different legal analysis. Moreover, Michigan has no

citizenship requirement for admission to the bar, the Michigan Supreme Court having held in 1973, by grant of a request for mandamus made by a native of Canada, that United States citizenship may not be imposed as a condition for admission to the practice of law consistent with equal protection. In re Houlahan, 389 Mich 665, 667; 209 NW2d 250 (1973).

Nor does Michigan's decision in this case conflict with Dingemans v Board of Bar Examiners, 152 Vt 494; 568 A2d 354 (1989). In Dingemans, the Vermont court held that the rule of admission challenged there, requiring that an applicant be a citizen of the United States or an alien who has been lawfully admitted to the United States for permanent residence, violated the Supremacy Clause of

the United States Constitution insofar as it denied admission to the Vermont bar "strictly on grounds of the alien status of an individual." 568 A2d at 357. No contrary holding of the Michigan Supreme Court was, or could have been, rendered in this case, because section 934 of the RJA has nothing whatever to do with citizenship. Thus, at best, Petitioner can only argue a conflict of results, which is an insufficient basis for this Court's consideration on certiorari.

Moreover, different results in the two cases are warranted by the different circumstances presented. In this case, in contrast to the facts in Dingemans: 1) a different kind of visa is involved (a Trade Canada visa and not an H-1 visa); 2) the visa was issued pursuant to

the terms of the United States-Canada Free Trade Agreement (not involved in Dingemans); and 3) the federal Office of the United States Trade Representative directly advised that nothing in the applicable chapter of that agreement required a state to waive its residency requirements for admission to its bar for lawyers granted a United States temporary entry visa (such as Petitioner's). The unique facts of this case distinguish it from Dingemans and all the other cases cited by Petitioner which alone should serve to disqualify it from certiorari review by this Court.

II

THE PETITION PRESENTS NO VITAL OR IMPORTANT ISSUE OF FEDERAL LAW IN NEED OF THIS COURT'S AUTHORITATIVE VOICE.

While the issues raised in the Petition may be of importance to Petitioner personally, a review of the cases cited in the Petition reveals that its issues are not of vital interest to the public generally or to numerous others. Petitioner cites to no other case (except Dingemans discussed above) involving a challenge to a state's bar admission requirement that an applicant reside in any state or territory of the United States or the District of Columbia, let alone numerous cases across the country or along our borders in which inconsistent rulings on constitutional issues speak to a need for this Court's final resolution and guidance.

III

THE COURT BELOW CORRECTLY DENIED MANDAMUS RELIEF BECAUSE SECTION 934 OF THE RJA IS CONSTITUTIONAL UNDER BOTH THE SUPREMACY CLAUSE AND EQUAL PROTECTION CLAUSE OF THE FEDERAL CONSTITUTION.

A. Supremacy Clause.

Petitioner is a legal, non-immigrant, nonresident alien. He argues that the federal government's authority to regulate the status and conduct of aliens serves to invalidate the residency requirements of section 934 of the RJA under the Supremacy Clause, Art. VI, cl 2 of the Federal Constitution, because such a requirement imposes an additional, impermissible burden on legal aliens seeking to practice law in Michigan not contemplated by Congress under 8 USC § 1101 et seq, the Immigration and Nationalization Law of 1952 (INA). As a

holder of a non-immigrant Trade Canada visa under 8 USC § 1184(e) and 8 CFR, Chapter 1, § 214.6(b)(3), he asserts section 934 of the RJA cannot be applied consistent with federal policy. Pet. 10-12.

Petitioner's argument, however, only selectively presents and therefore misapprehends the applicable federal policy and correctly failed to persuade the Michigan Supreme Court below. As shown infra, a full review of the applicable provisions compels the conclusion that the residency requirements of section 934 of the RJA are not only consistent with federal policy, they are expressly incorporated therein.

Under 8 USC § 1184(e), a Canadian citizen may be admitted into the United

States to engage in business activities at a professional level "under [promulgated] regulations of the Attorney General." The applicable regulation is 8 CFR § 214.6(d) under which an applicant for admission "shall present" documentation demonstrating engagement in business activities at a professional level and demonstrating professional qualifications. Nowhere discussed in the Petition is 8 CFR § 214.6(d)(2)(E) which specifies that the documentation "shall fully affirm ... [t]hat the Canadian citizen complies with all applicable state laws and/or licensing requirements for the business activity to be engaged in ... ." Even more specific is Schedule 2 to Annex 1502.1 of the United States-Canada Free Trade Agreement referenced in 8 USC § 1184(e) which lists each profession

covered by the agreement and the "minimum requirements" for each. 8 CFR § 2143.6(d)(2)(ii). Lawyers are listed on Schedule 2 as being required to show, at a minimum, that they are a "member of bar in province [for U.S. applicants] or state [for Canadian applicants]" and holding either an "L.L.B., J.D., L.L.L., or B.C.L."

These federal policies, as advised by the Office of the United States Trade Representative, by no means operate to displace or invalidate state licensing requirements, including residency requirements; to the contrary, they affirmatively incorporate them. Petitioner's visa presumably affords him the opportunity to practice law in Florida where he alleges he is a member of the

bar in good standing. Pet. 4. His visa does not, however, qualify Petitioner to practice law in every state of the United States, including Michigan, where he does not meet all licensing requirements, merely because he is lawfully admitted to practice in one state where he presumably has met all requirements. Petitioner's interpretation is directly contrary to federal immigration policy and correctly failed to persuade the court below.

B. Equal Protection Clause.

Petitioner contends that as a legal, nonresident alien, he is a member of a "suspect class" against whom section 934 of the RJA invidiously discriminates without serving a compelling state governmental interest. Pet. 17. The two premises on which Petitioner's entire

argument is based are that: 1) section 934 of the RJA creates a classification based on alienage and must therefore withstand strict scrutiny analysis; and 2) the cases analyzing equal protection challenges make no "distinction between residents, non residents, immigrant or non immigrant aliens ... ." Pet. 14. Because both of the principles forming the foundation of Petitioner's position are erroneous, his equal protection argument was correctly found unpersuasive by the court below and should not be a basis for granting certiorari in this case.

Regarding the classification at issue, Petitioner is simply in error when he characterizes the residency requirement of section 934 as a classification based on alienage. Neither alienage nor

citizenship forms the basis for the state's classification in section 934 of the RJA; only residency is involved. It is not Petitioner's status as an alien that prevented him from qualifying for licensure, but rather his failure to demonstrate that he resided in any state or territory of the United States or the District of Columbia. A United States citizen permanently residing abroad, for example, would not meet the residency requirement of section 934 although not an alien, whereas a legal alien residing in any state of the United States would be eligible for licensure completely irrespective of his or her status as an alien. Petitioner's suggestion that only aliens are subject to the residency requirements of section 934 (Pet. 18) is unsupportable because it confuses laws

requiring residency in a particular state, found invalid under the Privileges and Immunities Clause, with laws such as section 934 of the RJA requiring only residency in any state or territory.

While Petitioner's citation to cases addressing the constitutionality of classifications based on alienage are therefore inapposite, nevertheless even those citations address themselves only to the equal protection rights of resident aliens. See, e.g., Bernal v Fainter, 467 US 216 (1984); Plyler v Doe, 457 US 202 (1982); Ambach v Norwick, 441 US 68 (1979); Mathews v Diaz, 426 US 67 (1976); Graham v Richardson, 403 US 365, 371 (1971); In re Griffiths, 413 US 717 (1973); Carlson v Landon, 342 US 524, 529 (1951); Takahashi v Fish & Game Commis-

sion, 334 US 410 (1948); Truax v Raich, 239 US 33 (1915); Yick Wo v Hopkins, 118 US 356 (1886). See also United States v Verdugo-Urquidez, 494 US 259, 271 (1990) (listing cases in which this Court has held that resident aliens enjoy certain constitutional rights.)

Perhaps in recognition of his inability to cite a case in which a nonresident alien has been held entitled to the full breadth of benefits afforded under the Equal Protection Clause, Petitioner attempts to focus on what he describes as his jurisdictional ties to the United States. What Petitioner asserts in factual support of this claim, however, was not established or developed as part of the record below, but rather was put in issue by the Board. Therefore, this case

serves as an inadequate vehicle for consideration of Petitioner's Equal Protection argument by this Court.

Even assuming for the sake of argument, however, that Petitioner satisfied the jurisdictional requirements of the Equal Protection Clause and therefore had standing to challenge section 934 of the RJA, it is nevertheless constitutional. Section 934 is directed to residency, not alienage, and is therefore neither based on any suspect criteria nor does it impair a fundamental right. The statute is accordingly deemed constitutional if it is rationally related to a valid state objective. Schware v Board of Bar Examiners, 353 US 232 (1959). Michigan's interest in enacting section 934 is to protect the public and to assure a compe-

tent bar. By requiring residency in a state or territory of the United States, Michigan assures that attorneys are amenable to supervision and discipline and that its citizens are protected against attorney misconduct through the availablility of service of process and of assets subject to attachment to enforce judgments that may be obtained. Thus, the court below correctly denied Petitioner's request for mandamus.

IV

THE COURT BELOW CORRECTLY DENIED MANDAMUS RELIEF BECAUSE SECTION 934 OF THE RJA IS CONSISTENT WITH THE DICTATES OF THE FEDERAL COMMERCE CLAUSE AND DOES NOT VIOLATE 42 USC § 1981.

A. Commerce Clause.

Nothing in the Federal Constitution's article I, section 8 Commerce Clause bars the State of Michigan from applying its bar admission residency requirement to Petitioner.

The cases cited by Petitioner addressing Congress' regulation of interstate commerce and prohibition against state economic protectionism are inapposite because he cannot show that section 934 of the RJA has any negative impact on interstate commerce whatsoever. By its terms, section 934 requires that appli-

cants demonstrate residency in any state of the United States or any of its territories or the District of Columbia. Commerce between the states is, accordingly, in no way impaired by the act and Petitioner cannot show otherwise.

As to Petitioner's claim that Congress' authority to regulate commerce with foreign nations precludes Michigan from enforcing its licensing residency requirements, Petitioner relies on the United States-Canada Free Trade Agreement as the federal "free or open trading policy with a foreign country" which Michigan's statute allegedly contravenes. Pet. 26. However, for the same reasons stated in response to Petitioner's Supremacy Clause argument, his Commerce Clause argument fails as well. There is

no conflict or inconsistency between the federal trade policy and Michigan's residency licensure requirement; to the contrary, the two are consistent because the trade agreement as implemented contemplates and intends that states will have adopted licensing requirements for the particular business activity to be engaged in and that the visa holder has complied with "all [such] applicable state laws and/or licensing requirements." 8 CFR § 214.6(d) (emphasis added).

Petitioner's contested assertion that his payment of rent to a United States landlord and his efforts to engender future business between the United States and Canada "substantially affects international commerce" (Pet. 26) was insuffi-

cient to entitle him to mandamus relief below and should serve to deny review in this Court. None of the cases cited by Petitioner establishes that as a non-resident Canadian national he has standing to raise a Commerce Clause claim. Moreover, Petitioner is free to advance United States-Canada trade by practicing law and engendering business in the State of Florida where he has met the applicable requirements to engage in business activities contemplated by the agreement.

Finally, Petitioner argues that Canadian nationals should receive more favorable treatment on entering the United States to practice law than do American nationals on entering Canada. Again, in making this assertion, Petitioner reveals his misapprehension about

the federal policy embodied in the Free Trade Agreement. No provision of the agreement operates to validate residency requirements in Canada while invalidating such requirements in the United States; the requirements of each are expressly preserved. 8 CFR § 214.6(d).

B. 42 USC § 1981.

The Petitioner's final argument posits that he is entitled to admission to the Michigan bar because application of Michigan's residency requirement to him violates 42 USC § 1981. He prefaces his argument with the statement that 42 USC § 1981 is the "statutory equivalent of the Equal Protection Clause of the XIV Amendment to the U.S. Constitution ... ." (Pet. 28.) As the Board has discussed equal protection at length above, the

Court' attention is invited to that section as the Board's response to Petitioner's statutory argument which it incorporates here by this reference.

It bears repeating, however, that Michigan's residency requirement is a classification based on residence, and not on citizenship or alienage. Thus, as Petitioner asserts that § 1981 prohibits the purposeful denial of a legal alien's right to work based on alienage alone (Pet. 29), his reliance on this statute is misplaced.

CONCLUSION AND RELIEF SOUGHT

For all the foregoing reasons, Respondent respectfully urges this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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October 22, 1993

APPENDIX A

OFFICE OF THE UNITED STATES
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Susan I. Leffler, Esq.
Assistant Attorney General
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Dear Ms. Leffler:

Thank you for your letter, dated January 22, 1993, to Ambassador Kantor regarding state obligations in the legal services sector under the United States - Canada Free-Trade Agreement (CFTA). Ambassador Kantor has asked that I respond on his behalf.

Specifically, you asked whether any provision of the CFTA precludes Michigan from continuing to apply its residency

requirement to a non-resident Canadian national who applies for admission to the state bar of Michigan and who holds a TC-1 visa.

The two relevant chapters of the CFTA are Chapter 14 (Services) and Chapter 15 (Temporary Entry). Under Chapter 14, the United States and Canada undertook certain obligations regarding the cross-border provision of services. However, Chapter 14 applies only to those "covered services" listed in Annex 1408. Legal services are not among the services listed in this Annex and, therefore, are not subject to the requirements of Chapter 14.

Pursuant to Chapter 15, certain categories of Canadian professionals, including lawyers, meeting specified criteria may

be granted temporary admission to the United States to engage in the cross-border provision of their services. However, nothing in that Chapter requires a state to waive its residency requirements for admission to its bar for Canadian lawyers granted a U.S. temporary entry visa pursuant to that Chapter.

I hope this information is helpful. If you need any additional assistance, please feel free to contact me.

Sincerely,

/s/ Vanessa P. Sciarra
Vanessa P. Sciarra
Assistant General Counsel

cc: James A. Scarfone
2093 Ypres Boulevard
Windsor, Ontario

APPENDIX B

Michigan Court Rule 7.304
ORIGINAL PROCEEDINGS

(A) **When Available.** A complaint may be filed in the Supreme Court to implement the Court's superintending control power when an application for leave to appeal cannot be filed. A complaint for mandamus may be filed to implement the Court's superintending control power over the Board of Law Examiners, the Attorney Discipline Board, or the Attorney Grievance Commission.

(B) **What to File.** To initiate an original proceeding, a plaintiff must file with the clerk:

(1) 8 copies of a complaint;

(2) 8 copies of a brief conforming as nearly as possible to MCR 7.212(C);

(3) a notice of hearing, which must state that the complaint will be submitted to the Court on a date which is a Tuesday at least 21 days after the complaint is filed;

(4) proof that a copy of the complaint and brief was served on the defendant; and

(5) the fee provided by MCR 7.319(B)(7)(b).

Copies of documents, record evidence, or supporting affidavits may be attached as exhibits to the complaint. The complaint must be entitled: "[plaintiff] v. [Court of Appeals, Board of Law Examiners, Attorney Discipline Board, or Attorney Grievance Commission]," and the clerk is directed to re-entitle any papers otherwise entitled.

(C) Answer.

(1) The defendant must file 8 copies of an answer and a brief conforming with MCR 7.212(D) before the date the complaint is noticed for hearing. The defendant must serve 1 copy on the plaintiff and file proof of that service with the clerk.

(2) The grievance administrator's answer to a complaint for mandamus against the attorney grievance commission must show the investigatory steps taken and other pertinent information.

(D) Actions Against Attorney Grievance Commission; Confidentiality. The clerk shall keep the file in an action against the attorney grievance commission or the grievance administrator confidential and not open to the public if it

appears that the complaint relates to matters that are confidential under MCR 9.126. In the answer to a complaint, the grievance administrator shall certify to the clerk whether the matters involved in the action are deemed confidential under MCR 9.126. The protection provided by MCR 9.126 continues, unless the Court otherwise orders.

(E) Decision. There is no oral argument on the complaint. The Court may set the case for argument as on leave granted, grant or deny the relief requested, or enter another order it finds appropriate, including an order to show cause why the relief sought in the complaint should not be granted.